In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1583

JIM HATTON INDIVIDUALLY AND D/B/A AIR CONTROL ENGINEERING COMPANY, PETITIONER

v.

PETER J. BRENNAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is reported at 474 F.2d 9. The opinion of the district court (Pet. App. 5-13) is reported at 348 F.Supp. 895.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1973. The petition for a writ of certiorari was filed on May 25, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the definition of covered enterprise in Sections 3(r) and 3(s) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(r) and (s)) excludes from the cov-

erage of the Act employers who are engaged in only one business.

2. Whether an employer who has "employees handling * * * or otherwise working on goods that have been moved in * * * [interstate] commerce" is exempt from enterprise coverage under Section 3(s) by reason of the fact that his employees are not engaged in interstate commerce or in the production of goods for interstate commerce.

STATUTES INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201 *et seq.*, are set forth in the petition at pp. 3-5.

STATEMENT

The Secretary of Labor brought this action under Section 17 of the Fair Labor Standards Act of 1938 (29 U.S.C. 217) to enjoin petitioner from violating the Act's minimum wage, overtime, and recordkeeping provisions, and from continuing to withhold unpaid wages due to his employees (A. 3-7).[1] The district court dismissed the complaint without reaching the merits, on the ground that the employees were not covered by the Act (A. 16). The court of appeals reversed, upholding the Secretary's position that petitioner's business is a covered enterprise within the definition of Section 3(s) of the Act (Pet. App. 5).

Petitioner is engaged in Texas in the installation and maintenance of air conditioning and heating systems,

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[1] "A." references are to the appendix filed in the court of appeals. We are lodging a copy of that appendix with the Clerk. "Pet. App." refers to the appendix to the petition for certiorari which petitioner has filed under separate cover.

including duct work, in new and in occupied residential structures (Pet. App. 6).[2] Most of the parts used in these operations are manufactured outside of Texas and have moved in interstate commerce before reaching petitioner (Pet. App. 11).

ARGUMENT

1. The court of appeals correctly held that "[petitioner] is not exempt from the Act's requirements solely because it is engaged in only one business" (Pet. App. 2). As the court noted, the legislative purpose in adding enterprise coverage to the scope of the Act in 1961 was "to eliminate fragmentation" of the Act's application by which some employees in a business or establishment had the protection of the Act and others who worked side by side with them did not. S. Rep. No. 145, 87th Cong., 1st Sess., p. 31. There is no reason why Congress would have wished to eliminate such fragmentation only in the special case of employees who work for employers engaged in two or more industries. If anything, the contrary intention is stated in the Committee Reports of both Houses: "The bill's approach is to treat as separate enterprises those businesses which are unrelated to each other" (H. Rep. No. 75 (Fair Labor Standards Amendments of 1961), 87th Cong., 1st Sess., p. 7; S. Rep. No. 145, *supra*, p. 41).

It is plain also from the text of Sections 3(r) and 3(s) of the Act that the 1961 Amendments contemplated that single businesses would be subject to enterprise

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[2]As the district court noted (Pet. App. 6), the Secretary claims coverage of petitioner's air conditioning business on the ground that such a business is itself a covered enterprise. It is therefore unnecessary to consider petitioner's other activities discussed in the district court's opinion (Pet. App. 8-10).

coverage. For example, Section 3(s), in defining covered enterprises, refers expressly to "an enterprise" which "(1) * * * is a gasoline service establishment" or "(2) is engaged in laundering * * *," or "(3) is engaged in the business of construction" or "(4) is engaged in the operation of a hospital."

Accordingly, the courts have in a large number of cases held businesses to be covered enterprises without reference to any second business operated by the same employer. *E.g., Wirtz* v. *Melos Construction Corp.*, 408 F. 2d 626 (C.A. 2); *Shultz* v. *W. R. Hartin & Son, Inc.*, 428 F. 2d 186 (C.A. 4); *Brennan* v. *Greene's Propane Gas Service*, 21 WH Cases 57, 71 CCH Lab. Cas. par. 32,907 (C.A. 5, No. 71-2339, May 16, 1973); *National Automatic Laundry and Cleaning Council* v. *Shultz*, 433 F. 2d 689 (C.A. D.C.); *Wirtz* v. *Allen Green & Associates*, 379 F. 2d 198 (C.A. 6). Prior to its reversal, the instant district court decision stood alone in holding a second business to be required for enterprise coverage under the Act.

2. In holding that the commerce requirement of Section 3(s) is satisfied by the "handling" of goods originating outside the State (Pet. App. 5), the court below is in accord with the other courts of appeals which have ruled on the issue. See *Wirtz* v. *Melos Construction Corp., supra*, 408 F. 2d at 627-628 (C.A. 2); *Clifton D. Mayhew Inc.* v. *Wirtz*, 413 F. 2d 658, 662 (C.A. 4); see also *Shultz* v. *Kip's Big Boy, Inc.*, 431 F. 2d 530, 532-533 (C.A. 5).

That holding is correct. Section 3(s) defines covered enterprises as "including [those having] employees handling * * * goods that have been moved in * * * commerce," and the courts below here found that "most of the parts used by [petitioner's] employees in their

work 'were manufactured outside of and had moved in commerce getting to Texas' " (Pet. App. 5). The legislative history of the Act confirms the plain meaning of this statutory language. See *Melos, supra,* 408 F. 2d at 628-629; *Mayhew, supra,* 413 F. 2d at 662. It shows a specific intention to extend the Act's coverage to enterprises using goods originating out of the State in recognition of "[t]he obvious economic fact that demand for a product causes its interstate movement quite as surely as does production" (see 107 Cong. Rec. 6236). In the House, this extension was attacked as a "far reaching" provision which would "subject to Federal regulation any entire enterprise which has one or more employees, who handle, sell, or otherwise work on goods 'that have been moved or produced for commerce * * *' " (107 Cong. Rec. 4631), "notwithstanding the fact that the employees may not be engaged in commerce or in the production of goods for commerce in the traditional sense" (H. Rep. No. 75, 87th Cong., 1st Sess., "Minority Views," p. 63). The House then substituted a more limited definition of enterprise coverage (107 Cong. Rec. 4797, 4812-4813). In the Senate, however, the Committee Report urged adoption of the original text (S. Rep. No. 145, 87th Cong., 1st Sess., p. 3), and motions to substitute more limited definitions omitting the "handling" provision were rejected (107 Cong. Rec. 6088-6089, 6243). The "far reaching" definition retained in the Senate bill was accepted in conference (Conf. Rep. to Accompany H.R. 3935, H. Rep. No. 327, 87th Cong.,

1st Sess., pp. 2, 14-16) and enacted. That definition was correctly applied here.[3]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[3]In *Maryland* v. *Wirtz*, 392 U.S. 183, 188, the Supreme Court stated that "the effect of the 1961 change was * * * not to enlarge the class of employers subject to the Act". As the Court of Appeals for the Second Circuit has pointed out, however, that statement was addressed only to the portion of the 1961 amendment which extended the Act's coverage to all employees of enterprises that had some employees engaged in commerce or in the production of goods for commerce. It was "not directed to the impact of the words concerning employees working with goods that 'have been moved in * * * commerce * * *' " (*Melos*, *supra*, 408 F. 2d at 628, n. 5).